Supreme Court, U.S.
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No. 94-1401

In The

Supreme Court of the United States

October Term, 1994

STEVE NAKAMURA, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Tenth Circuit Court Of Appeals

PETITIONERS' REPLY TO WRIT OF CERTIORARI

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I. A RECENTLY DEVELOPED SPLIT IN THE CIRCUITS OVER WHETHER THE USE OF A POLICE OFFICER'S COMPELLED INTERNAL AFFAIRS STATEMENTS IN A GRAND JURY PROCEEDING VIOLATES HIS FIFTH AMENDMENT RIGHTS REQUIRES DEFINITIVE RESOLUTION BY THIS COURT.

Garrity and its progeny mandate that before a police officer's Internal Affairs statements can be subpoenaed for use by a grand jury, the district court must make a threshold finding that the officer is not a target of the grand jury investigation and that the grand jury has a clear need for any Internal Affairs statements of a non-target witness. Only by implementing such safeguards can this Court assure that the Fifth Amendment rights of police officers are protected. *Garrity v. New Jersey*, 385 U.S. 493 (1967); *see In re Grand Jury Proceedings: Kinamon*, 45 F.3d 343 (9th Cir. 1995).

Contrary to the position taken by the government in its Brief for the United States in Opposition (Response), the Officers' adamantly challenge the decision below that disclosure of their Internal Affairs statements to the grand jury did not violate their Fifth Amendment rights. (Response at 8; Petition at 19-26). Petitioners argued below and assert here that the disclosure of their Internal Affairs statements to the grand jury caused an impermissible violation of the Fifth Amendment to transpire in the grand jury's presence. (Petition at 19).

The court below rejected the Officers' claim that the production of their Internal Affairs statements for use by the grand jury violated their Fifth Amendment privileges. (App. at 14-15). In so doing, the court erroneously concluded that a grand jury investigation is not the type of criminal proceeding that implicates the Fifth Amendment or triggers the protections afforded by *Garrity*. *Id.* at 16-17. "[W]e simply have no way of knowing whether the

statements have been, or will be, used in a constitutionally proscribed manner." *Id.* at 17. In reaching this decision the court narrowly interpreted the Fifth Amendment rights of police officers and concluded that the only types of criminal proceedings protected by *Garrity* are those which follow a police officer's indictment on criminal charges. *Id.*

In direct conflict with the position taken by the Tenth Circuit in this case, the Ninth Circuit recently reversed a district court's order refusing to quash a subpoena issued to a police officer's supervisor requiring him to produce the officer's Internal Affairs statements for use in a grand jury investigation. *Kinamon*, 45 F.3d at 348.[1] Noting that pursuant to *Garrity* the Fifth Amendment shields a police officer from the use of compelled statements obtained under threat of removal from office in *any* criminal proceeding, the Ninth Circuit held:

> A grand jury is no more entitled to use a witness' immunized testimony against him to reach an indictment than is a trial jury permitted to use such testimony to reach its verdict.

Id. at 348. The court determined that a *Kastigar*-like evidentiary hearing should have been employed at some point to insure that the officer's *Garrity* rights had not been violated but left the details of conducting that hearing to the discretion of the district court. *Id.* at 348. It then

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[1] In *Kinamon*, the district court denied the police officer's motion to quash the subpoena on the grounds that the police department had no authority to grant a police officer use immunity and that a grand jury investigation was not the type of criminal proceeding that implicated a police officer's Fifth Amendment rights. *Id.* at 345-46. The district court then permitted an interlocutory appeal of its ruling prior to requiring the release of any of the police officer's compelled Internal Affairs statements. *Id.*

remanded the case to the district court with instructions to reevaluate its conclusions in light of the "correct legal position[]" that a grand jury investigation is a criminal proceeding implicating the Fifth Amendment protections provided by *Garrity*. *Id.* In light of these instructions, it is most reasonable to assume that the district court would hold the required hearing prior to the release of such statements in order to guarantee that the police officer's Fifth Amendment rights were fully protected.

The Ninth Circuit's decision in *Kinamon* is on all fours with the position asserted by the Officers here, and the relief authorized by *Kinamon* is similar if not identical to the relief sought by the Officers in this case. Plainly, the Officers' Fifth Amendment rights can be fully protected only where the district court conducts an evidentiary hearing prior to the unsupervised and blanket release of their compelled Internal Affairs statements to the government. To rely for protection on the government in an adversarial proceeding where the government is the enemy, as the Tenth Circuit clearly if mistakenly does, makes a mockery of the Officers' *Garrity* protections. (App. at 17-18).

The contradictory decisions by the Tenth Circuit in the present case and the Ninth Circuit in *Kinamon* dramatically illustrate the gulf that separates the circuits on the issue of whether a grand jury investigation is the kind of criminal proceeding which implicates a police officer's Fifth Amendment rights and for which *Garrity* and its progeny afford protection. *Kinamon*, 45 F.3d at 348; *compare United States v. North*, 920 F.2d 940, 947 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *contra In re Grand Jury Subpoenas: Stover*, 40 F.3d 1096 (10th Cir. 1994). To protect against continuous and recurring violations of the Officers' Fifth Amendment rights, the Officers have requested this Court to adopt the simple and reasonable

expedient of requiring the grand jury prosecutor to certify that any police officer whose Internal Affairs statements have been subpoenaed for grand jury use is not a target of that grand jury investigation. (Petition at 24). In addition, because prosecutors cannot always know for certain whether a non-target officer will later become a target based on information discovered in his Internal Affairs statements, the Officers have also requested this Court to require an evidentiary hearing to determine the grand jury's actual need for the subpoenaed information. The Officers have requested these reasonable and common sense procedures to preserve the "rational accommodation" of policy interests and constitutional rights recognized by *Garrity*. (Petition at 27-28).

Because "a grand jury is no more entitled to use a witness' immunized testimony against him to reach an indictment than is a trial jury permitted to use such testimony to reach its verdict" the procedural protections requested by the Officers are to the grand jury investigation what the *Kastigar* protections are to a trial. *Kinamon*, 45 F.3d at 348 (Petition at 26). Both proceedings are criminal in nature. *Id.* Thus, the Fifth Amendment jurisprudence developed by this Court in *Garrity* and its progeny demands that an indictment, like a verdict, be arrived at free from the use of police officers' compelled Internal Affairs statements. *Id.*

II. THE CONCLUSION OF THE GRAND JURY INVESTIGATING KLUNCK'S SHOOTING HAS NOT RENDERED THIS CASE MOOT BECAUSE THIS COURT CAN GRANT EFFECTUAL RELIEF NAMELY THE RETURN OR DESTRUCTION OF THE INTERNAL AFFAIRS STATEMENTS IN POSSESSION OF THE GRAND JURY.

A. Under this Court's recently established test in *Church of Scientology of California v. United States*, 113 S. Ct. 447 (1992), this case is not moot because this Court can order that the grand jury's copies of the Internal Affairs statements be either returned or destroyed.

In its Response, the government argues that this case is moot because the grand jury investigation of the Peter Klunck shooting has concluded rendering it impossible for this Court to grant the Officers effectual relief. (Response at 7). In addition, the government argues that this case does not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. (Response at 7, *citing Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976)). The government is mistaken on both points.

To begin with, the case is not moot because this Court can still grant real relief to the Officers. In *Church of Scientology of California v. United States*, 113 S. Ct. 447 (1992) this Court established an explicit test for mootness in the context of subpoenas or summons and has overruled the cases cited by the government. Specifically, the Court held that a case is rendered moot only when an event occurs that "makes it impossible for the Court to grant 'any effectual relief whatsoever' to a prevailing party." *Church of Scientology*, 113 S. Ct. at 449 *quoting Mills v. Green*, 159 U.S. 651 (1895). *Church of Scientology* involved an IRS summons to a state court clerk for two

tape recordings. The clerk had complied with the summons by the time the appeal was considered by the Ninth Circuit. The Ninth Circuit dismissed on mootness grounds and this Court reversed. In a unanimous decision authored by Justice Stevens the Court wrote, "[t]his case is not moot because if the summons were improperly issued or enforced a court could order that the IRS' copies of the tapes be either returned or destroyed." 113 S. Ct. at 451.

Relying upon this Court's decision in *Church of Scientology*, the court below applied the correct standard and concluded that it could still afford the Officers "some modicum" of the relief they sought by ordering the return or destruction of the Internal Affairs files. (App. at 8-9). The fact that the grand jury has since concluded its investigation into the Peter Klunck shooting does not change the correctness of the Tenth Circuit's decision. Applying the *Church of Scientology* test, there is no question that this Court can fashion effective relief for the Officers by ordering the return of all Internal Affairs statements to the Albuquerque Police Department Internal Affairs office, or to the Officers themselves, or by ordering that all such disclosed documents be destroyed.[2]

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[2] It would be particularly unfair to apply the mootness doctrine in a situation where, as here, a third-party record custodian had been compelled to disclose the material. The doctrine developed by this Court in *Perlman v. United States*, 247 U.S. 7 (1918) provides that a discovery order directed to a disinterested third-party is treated as an immediately appealable final order because the third-party lacks a sufficient stake in the proceeding to risk contempt by refusing compliance. *See* generally, 15B C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure § 3914.23, pp. 156-167 (2d ed. 1992). It would be absurd to hold, as the government urges here, that each time a third-party produces the subpoenaed material and the grand jury uses the material and concludes its investigation prior to

Here the Officers urge the Court to protect their Internal Affairs statements, given under the Fifth Amendment privilege extended them by *Garrity* and its progeny. There is no logical, legal or policy distinction that can be made in failing to afford the mootness analysis established in *Church of Scientology* to this case. The placement of the Officers' Internal Affairs statements in the hands of federal prosecutors and successive grand juries, is a continuing Fifth Amendment violation. These actions have disturbed the rational accommodation of policy interests and constitutional rights protected by *Garrity* and its progeny. Increasingly, appellate courts have begun to recognize that the very use by the grand jury of such statements causes a Fifth Amendment violation to transpire before the grand jury. *Kinamon*, 45 F.3d at 348; *Weaver v. Brenner*, 40 F.3d 527, 535 (2nd Cir. 1994); *United States v. North*, 920 F.2d at 947; *United States v. Beery*, 678 F.2d 856, 860 (10th Cir. 1982). That Fifth Amendment violation is no less profound than the Fourth Amendment violation (right to privacy) recognized in *Church of Scientology*, 113 S. Ct. at 450.

Nor is it significant that the Officers never specifically requested the District Court to order the return or destruction of the records. Such a technical prerequisite to fashioning appropriate relief is not endorsed in *Church of Scientology* nor in cases extending relief to individuals whose rights have been implicated by grand jury subpoenas. *See, e.g., In re Grand Jury Proceedings: Vargas*, 723 F.2d 1461 (10th Cir. 1983). In fact, these cases typically develop where the interested person has no control over the materials themselves, and the materials are disclosed

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the conclusion of the appeal, the parties whose rights are at stake must accept dismissal of their appeal as moot, although entitled to intervene and appeal under the *Perlman* doctrine.

after the District Court proceedings have ceased and an appeal is already under way. That was the very factual setting in *Church of Scientology*. 113 S. Ct. at 449 ("while the appeal was pending, copies of the tapes were delivered to the IRS."). It is unfair to require the Officers to have been clairvoyant and anticipate all possible eventualities regarding the disclosure of the materials. They moved that the subpoena be quashed and raised the legal argument that their *Garrity* rights were being violated. To ask for more would exalt form over substance. Here, the Officers asked that the subpoenas be quashed. That request, as this Court implicitly recognized in *Church of Scientology*, was enough to preserve their right to later request that the records be returned once disclosure was made.

B. The issues raised here are capable of repetition, yet evading review and should be considered by this Court.

Contrary to the government's claims, this case fits squarely into the mootness exception known as "capable of repetition yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 148-149 (1975); *see also Roe v. Wade*, 410 U.S. 113, 125 (1973); *In re Grand Jury Proceedings: Doe*, 863 F.2d 667 (9th Cir. 1988); *In re Grand Jury Proceedings: Larson*, 785 F.2d 629 (8th Cir. 1986). This Court requires that two elements be satisfied to bring a case within this exception: (1) whether the challenged action was too short to be fully litigated prior to being rendered moot, and (2) whether there is a reasonable expectation that the same complaining party could be subjected to the same type of action again. 423 U.S. at 148.

Here, the Officers faced a rapidly moving grand jury subpoena disclosure attempt, a circumstance that did not afford an opportunity to fully litigate their interests prior

to compliance by the records custodian. As the court noted in *Larson*, "a grand jury's term and its investigations are by their very nature of limited and relatively short duration" so that issues " 'could not, or probably would not, be able to be adjudicated while fully "live." ' " 785 F.2d at 631, *citing Dow Chemical Co. v. EPA*, 605 F.2d 673, 678 n.12 (3rd Cir. 1979). The *Larson* court found that the first prong of the mootness exception had been met but concluded that the second prong remained unsatisfied because the appellants did not have a reasonable expectation of again being subpoenaed to testify before a grand jury in the same type of action. *Id.*

Unlike the appellants in *Larson*, this case satisfies both prongs of the mootness exception. These Officers are frequently interviewed by IAU investigators in connection with incidents where police officers discharge their weapons. Commonly, these incidents result in criminal investigations. Therefore, unlike the appellants in *Larson*, the Officers have a real and very reasonable expectation that they will again by subpoenaed to testify in the same type of action. *See In re Grand Jury Proceedings: Doe*, 863 F.2d at 669.

This case presents a situation similar to the one presented to the Court in *Roe v. Wade*. There, the Court found that the normal 266-day gestation for pregnancy created a situation where the pregnancy would come to term, rendering the petitioner's assertion of her constitutional rights moot before the usual appellate process was complete. *Roe*, 410 U.S. at 124. The Court explained that because pregnancy "often comes more than once to the same woman" it "provides a *classic justification* for a conclusion of nonmootness. It truly could be 'capable of repetition yet evading review.' " *Id.* (citation omitted, emphasis added). Like the situation at issue in *Roe*, this case provides a similar "classic justification for conclusion of

nonmootness." It is probable, even inevitable, that the Officers' Internal Affairs statements will again be the subject of subpoenas by a federal or state grand jury. Those subpoenas are directed to the custodians of Internal Affairs records and not to the Officers themselves. Without a resolution of the substantive issues presented by their claims, the Officers will be caught on a legal merry-go-round of subpoenas issued to custodians who are not willing to resist compliance, but whose actions render the Officers' efforts to vindicate their *Garrity* rights moot by turning over the records to the requesting authority.

CONCLUSION

For these reasons and each of those set forth in the Petition, the Officers request this Court grant their Petition for Writ of Certiorari and address the merits of the Officers' claims to clarify the scope of the protections afforded by *Garrity* and its progeny and to resolve the split in the circuits regarding at what stage of the criminal process those protections are called into play. The Officers further request that the Court implement the simple procedural safeguards they request in order to preserve their Fifth Amendment rights and to protect the integrity of the grand jury process.

Respectfully submitted,

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